`STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GARTNER GROUP, INC.	:	ORDER DTA NO. 807983
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1984 through February 28, 1988.	:	

Upon petitioner's notice of motion to reopen on the basis of newly-discovered evidence pursuant to 20 NYCRR 3000.5 and CPLR 5015(a)(2), relieving petitioner from a determination issued January 21, 1993 and vacating and setting aside that determination and granting a new administrative hearing upon the ground of newly-discovered evidence which, if introduced at the prior hearing, would probably have produced a different result, and upon the affidavit of Kenneth I. Moore, Esq., made April 21, 1993, together with annexed exhibits, and upon the affirmation of Kenneth I. Moore, dated June 11, 1993, together with annexed exhibits, and upon an affirmation of James Della Porta, Esq., dated May 25, 1993, together with annexed exhibits in opposition thereto, the following facts are found:

On March 1, 1991, a hearing in the instant matter was commenced before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York. Gartner Group, Inc. ("Gartner") was provided until June 3, 1991 to submit additional documentation. By letter dated May 29, 1991, petitioner's time to submit additional documentation was extended to July 8, 1991 by the Administrative Law Judge. Petitioner submitted additional documentation by letters dated July 9, 1991 and August 29, 1991. The Division of Taxation ("Division")submitted its brief in response to petitioner's submitted documentation on October 21, 1991. In January and March 1992, petitioner submitted additional documentation into the hearing record. The hearing was rescheduled for January 14, 1992 and March 11, 1992. Both hearings were adjourned. In a telephone

conversation between the respective parties' representatives and the Administrative Law Judge on March 9, 1992, the parties agreed that the March 11, 1992 hearing was no longer necessary. Petitioner requested and was given until March 13, 1992 to submit additional documentation. It was agreed, that thereafter, the record would be closed. A briefing schedule was established which concluded on May 22, 1992.

The issue of the hearing was whether petitioner established that an audit-based assessment should be reduced due to claimed overlapping audits of petitioners' customers, claimed exempt sales and/or the possession by certain customers of direct payment permits.

During the course of the hearing and the period of time that the record remained open, petitioner submitted copies of customer invoices for the audit period and a summary sheet showing the computation of the tax attributable to each invoice. In support of its position relating to the issue of overlapping audits, petitioner introduced letters from its customers concerning New York State sales and use tax field audits that had been conducted for periods during which the customers had made purchases from Gartner. The contents of the letters can be divided into four categories:

(a) The following customers' letters indicated that they had been audited for the same audit period and had agreed to or paid the audit findings. In addition, six of the customers' (*) letters were accompanied by a signed consent fixing the tax due:

AT & T
Bankers Trust Company
Barrons (Dow Jones)
CBS, Inc. *
Chase Manhattan Bank
Ciba-Geigy
Citicorp
Citicorp NA, Inc.
Computer Associates
Computer Consoles, Inc.
Consolidated Edison
Continental Insurance*
Corning Glass
Dillon Read & Co., Inc.
Ernst & Young
E. F. Hutton
Equitable Life Assurance
European American Bank
National Westminster Bank
G.E. - Knolls Atomic Power Lab
Irving Trust (Bank of New York)
Manufacturers Hanover
McGraw-Hill*
Metropolitan Life Insurance
Morgan Guaranty Trust
Morgan Stanley
MSC, Inc.
New York Times
Paine Webber
Paramount Pictures
Pepsico
Philip Morris
Salomon Bros.
Siemens Info Systems
SIAC*
Union Pacific*

First Boston Corporation
Forbes*
United States Trust
United Technologies

The letters indicated that either the tax due on the transactions with Gartner was paid as part of the agreement with New York State or that there was no agreement to exclude the transactions with Gartner from the audit.

(b) The following letters indicated that the customers were currently being audited for the same audit period:

Avon Products, Inc.
Bear Stearns
Coopers & Lybrand
General Foods (Kraft)
IBM
Information Builders
ITT Corporation
Lehman Bros.
Manufacturers & Traders
Marine Midland Bank
Merrill Lynch
Shearson Lehman
Sprout Group (DLJ Inc.)
Xerox
Young & Rubicam, Inc.

(c) The letters of the following customers indicated that the customers were audited for the same audit period as petitioner but did not state whether the customer agreed to the audit findings:

Goldman Sachs & Co.
Grumman Data Systems
Joseph Seagram
Mobil Corp.
Mobil Oil Corp.
NBC
NEC America, Inc.

The letter from Grumman Data Systems further stated that for the audit covering the period March 1, 1984 through August 31, 1987, "the issue at hand was not assessed."

(d) The following customers indicated in their letters that they had been audited for the same period and had protested some or all of the audit findings. Where there was a partial consent, there was no indication whether it covered the same invoices as in the audit at issue:

Eastman Kodak
F. W. Woolworth

On January 21, 1993, a determination was issued wherein the Administrative Law Judge held that it was the Division's policy to reduce a vendor's assessment for any amount assessed on sales to a particular customer if the customer was audited and agreed to the audit findings for the same audit period, relying on the Tax Appeals Tribunal's decision in Matter of Allied Aviation Serv. Co. of N.Y. (June 27, 1991).

The Administrative Law Judge found that, based upon the Division's audit policy regarding overlapping audits, petitioner was entitled to an adjustment to the audit findings as to the customers listed in paragraph "3(a)" above, in that petitioner established through the customers' letters and supporting documents that these customers were audited and agreed to the audit findings for the same audit period. The Administrative Law Judge further found that petitioner was not entitled to any adjustment to the audit findings with regard to the customers listed in paragraphs "3(b)", "3(c)" or "3(d)". The information relating to these customers did not meet the requirements of the Division's audit policy as the audits were either ongoing and not, as yet agreed to ("3[b]"), were complete but not agreed to ("3[c]") or were being protested ("3[d]").

In his affidavit and affirmation in support of the motion, Mr. Moore asserted that after the determination had been issued, he contacted the 26 customers contained in paragraphs "3(b)", "3(c)" and "3(d)" and discovered that over one-half of the customers, subsequent to the date of the commencement of the hearing (March 1, 1991), had their audits completed and had agreed to the audit findings. Mr. Moore stated that the evidence was not available at the time of the hearing because the audits had not yet been completed and/or there was no agreement to the audit findings at such time.

Petitioner introduced in support of its motion 22 letters from customers advising that they had been audited for the same period as petitioner, that they had agreed to the audit adjustments and that there was no agreement to exclude transactions with petitioner from the audit. None of the letters contained the date that the audit was completed. Mr. Moore's assertions as to when the audits occurred in relation to the final date for submitting documentation can be divided into three categories:

(a) According to Mr. Moore, the following customers had their audits closed and the taxes paid after March 13, 1992:

American Express
Bear Stearns
General Foods (Kraft)
IBM
Manufactuers & Traders
Marine Midland Bank
Merrill Lynch
Sprout Group (DLJ Inc.)

ITT Corporation Young & Rubicam, Inc.

(b) According to Mr. Moore, the following audits were concluded before March 13, 1992:

Eastman Kodak
Goldman, Sachs & Co.
J.C. Penney
Joseph Seagram
Lehman Bros.
Mobil Oil Corp.
Mobil Corp.
NBC
Shearson Lehman
Xerox

(c) According to Mr. Moore, the following audit was closed when the Division allowed the statute of limitations to expire on an extension:

The Gleason Works

The affirmation of the Division's representative, James Della Porta, Esq., submitted in opposition to petitioner's motion, contends that petitioner's motion papers do not establish that due diligence was exercised in attempting to locate the evidence which petitioner now seeks to introduce. The affirmation further states that the new evidence does not meet the current audit guidelines concerning overlapping audits. In addition, the affirmation states that since a reasonable period of time has passed, in this case 18 months from the date of the first scheduled hearing to the last date for the submission of evidence, the hearing process must be concluded.

OPINION

Section 3000.5 of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides, in relevant part, as follows:

> "Motion Practice. (a) General. To better enable the parties to expeditiously resolve the controversy, this Part permits an application to the tribunal for an order, known as a motion, provided such motion is for an order which is appropriate under the Tax Law and the CPLR . . . .
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> "(6) The appropriate sections of the CPLR regarding motions, where not in conflict with this Part, are applicable to the motion being made."

Petitioner's motion to reopen was made under CPLR 5015, entitled "Relief from judgment or order", which provides, in pertinent part:

"(a) On Motion. The court which rendered a judgment or order may relieve a party

> from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
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> * * *
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> "(2) newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404 . . . ."

To warrant the reopening of the record on the basis of newly discovered evidence, the movant must show that the evidence is material, is not merely cumulative, is not of such a nature as would merely impeach credibility of an adverse witness and that it would probably change results if a new hearing were granted; the party requesting the reopening of the hearing must also show that the evidence has been discovered since the hearing and could not have been discovered before the hearing by exercise of due diligence (Mully v. Drayn, 51 AD2d 660, 378 NYS2d 187; Levantino v. Insurance Co. of North America, 102 Misc 2d 77, 422 NYS2d 995). In Matter of Jenkins Covington, N.Y. (Tax Appeals Tribunal, November 21, 1991, confirmed ___ AD2d ___ [1993]) the Tribunal discussed the issue of reopening a matter that under law had finally determined the controversy between the Division and petitioner therein on the grounds of newly discovered evidence. The Tribunal concluded that in order for a party to obtain reconsideration of a Tribunal decision, the party must show that the newly discovered facts could not have been discovered with due diligence and the party must offer a valid excuse for not submitting the facts upon the original application. Similar to the Tribunal, the authority for an Administrative Law Judge to reconsider or reopen the record with respect to an issued determination is limited. The statutes and rules of practice and procedure generally do not provide for such reconsideration or reopening of the record. The rules do make an exception with respect to default determinations (see 20 NYCRR 3000.10[b]). In addition, the Tribunal may remand a matter back to an Administrative Law Judge to reopen a hearing (see, e.g., Matter of Petro Enterprises, Tax Appeals Tribunal, September 19, 1991) or to reconsider a determination (see, e.g., Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, September 12, 1991). Absent such specific and exceptional circumstances however, the standard enunciated by the courts pursuant to CPLR 5015(a)(2) and by the Tribunal in Jenkins

Covington is properly applicable herein. Moreover, to apply a lesser standard for reconsideration or reopening of a record would be inconsistent with the very purpose of the Tribunal's Rules of Practice and Procedure, i.e., "to provide the public with a clear, uniform, rapid, inexpensive and just system of resolving controversies with the Division of Taxation" (20 NYCRR 3000.0[a]). Certainly, a lesser standard would put at risk the integrity of the administrative hearing process.

Applying these standards to the instant matter it is clear that petitioner has made an insufficient showing that the so-called newly discovered evidence was unavailable at the time of the hearing or could not have been discovered with due diligence prior to the hearing. As to the items contained in paragraph "6(a)", petitioner alleges that the audits were completed after the last date for the submission of evidence. Under these circumstances, they cannot be considered newly discovered evidence. Only evidence which was in existence but undiscoverable with due diligence prior to the completion of the hearing can be characterized as newly discovered evidence (see, Matter of Commercial Structures v. City of Syracuse, 97 AD2d 965, 468 NYS2d 957). In addition, there is no documentation which establishes that these audits were completed after the last day for the submission of evidence. With regard to the items contained in "6(b)", it was incumbent upon petitioner to establish the date the audits were completed and why such documentation could not have been introduced into the record prior to or at the last day for submitting evidence in this matter. Without such information, it cannot be determined when the documentation became available and whether petitioner made a sufficient effort to obtain the information so as to constitute it as newly discovered evidence. Contacting these customers after the issuance of the determination in this matter would not constitute due diligence. Finally, as to the item contained in paragraph "6(c)", without any information as to when this audit was concluded, no determination can be made as to when it became available and whether it can be classified as newly discovered evidence. Again, more than merely contacting this customer after the issuance of the determination would have been necessary to reach the level of due diligence. Having failed to show that the evidence in question constitutes newly discovered

evidence, petitioner's motion to reopen must be denied pursuant to CPLR 5015(a)(2) and the Tribunal's holding in Matter of Jenkins Covington, N.Y. (supra) (see also, Pezenik v. Milano, 137 AD2d 748, 524 NYS2d 828; Federal Deposit Ins. Corp. v. Schwartz, 116 AD2d 619, 497 NYS2d 477; Matter of Commercial Structures v. City of Syracuse, supra).

DATED: Troy, New York
September 2, 1993

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE